

Chairman Snow This is the Indiana Wholesale transfer application. I want to, before we get into too much detail as prerogative of the chair, I want to indicate my thoughts on preliminary matters. I've discussed them, at least independently, I believe, perhaps, with Commissioner Guthrie and maybe Commissioner Johnson. Anyway, we do have on the table...need to rule on the petition for intervener status filed by Wine and Spirits Wholesalers of Indiana, National Wine and Spirits, Inc. and Olinger Distributing. Also, there is a request that we consider, Indiana Beverage Alliance request as amicus curiae. Now, I have carefully read the excellent memorandums of law that have been provided to this commission on all of the issues. In fact, I've read them, as is my nature, several times. Having focused on the intervener issue, I, at least I am convinced that the motion to allow intervener status is not well taken. For those reasons, without going through an enormous amount of legal discussion here, I think the legal argument against the intervener request as set forth by Peter Rusthoven carries the day, as far as I'm concerned. I'll open this up now, if somebody is reading it different, let's talk about it. I'm not a dictator. Make sense to you?

Frank Guthrie I agree.

Dave Johnson Agree.

Dale Sturtz Agree.

Snow All right. Shall we then have a motion and do it by motion?

Guthrie I move that we deny the motions for intervener status.

Snow	Any further? Any second to that?
Johnson	Second.
Snow	Any further discussion? All those in favor signify by saying, aye.
Guthrie	Aye.
Sturtz	Aye.
Johnson	Aye.
Snow	Those opposed? That carries on a unanimous basis. All that means...the meaning of that on a legal standard, I did not find that the petition was well taken. That does not mean I'm going to ignore legal arguments posed by that particular entity, or any entity. People here have every right to voice their concerns, both on policy basis and on a legal basis. I used to say a few years ago, in another life, that I may be in error, but I'm most certainly not in doubt on this issue. That having been done, then we go forward. Now, I want to say these things about the merits of the petition for transfer. Yesterday afternoon, Mr. Dunsmore, at my request, emailed the attorneys telling them a methodology we were going to use today.
Ed Dunsmore	May I interrupt you? Do you want to do the amicus issue first?
Snow	Yes. I'm treating them as amicus.
Dunsmore	Okay. And the other amicus requests?
Snow	Everybody is an amicus. I don't think we need formal board action on that, unless you do. And, you're my lawyer.
Dunsmore	The other request was granted, also.

Snow Yes. We're granting that. Everybody here is an amicus curiae, as far as I'm concerned. Now, I'll have to look those two words up.

Sturtz I took minutes and got rid of it.

Snow If you were symptomatic, you wouldn't be sitting here. Thinking a lot of funny things I won't say now. I've got to learn that I can't be funny. I can be funny afterwards, but not now. Having indicated the degree of care I've taken in reading the excellent legal memorandums, I will be the first to say that I have not had an opportunity to study in the same degree what may be a preliminary Excise report that's been filed here. We got this report...I got it on my desk after Mr. Dunsmore emailed the lawyers on a procedure I wanted you folks to follow today. Then, this was on my desk. I sent it out, or Ed sent it out immediately, which is my nature. If I have it here, you should have it. Period. That's just how I work. Maybe I should've saved it and we should have had the discussion today. It's just I sleep more soundly when you have the things I have. Trying to be as transparent as I know how to be. Alex, I know this is the Excise report. Is there any comment you want to make on it at this point and time? I know Mr. Rusthoven is going to request, he's already alerted us, Bart, that he wants some time to absorb the report and then to respond to it in some detail. I don't think...I may have seen you pick yours up. Did you pick yours up today, or yesterday?

Bart Herriman About 4:15 yesterday.

Snow I didn't see your office come in.

Peter Rusthoven We got it roughly the same time.

Snow As much as I'm a believer in lawyers getting billable hours in, which helps the economy, I can't imagine an intelligent and detailed response to this in less than, you know, 24 hours. I'm anticipating Mr. Rusthoven saying he wants some time to respond.

Rusthoven Mr. Chairman, I have alerted Mr. Herriman.

Snow Have you? Good. I just want everybody to know that I sent it out. It was my call to send this out. Period. That's what is true. Any comments, Superintendent Huskey, on the report at this point and time?

Alex Huskey Thank you, Mr. Chairman. I just wanted to make this statement about this report. Officer Rich Swallow did an excellent job putting this document together in doing the investigation. The nature of what Excise wanted from this report was to be able to provide insight to the Commission and others as to some of the areas that we would have to look at, at some of the areas that may potentially lead to investigations in the future. This report does not indicate and should not indicate any violations at present. The whole idea behind this is that knowing what the issues are, it gives us the opportunity to look at any potential statutory changes that may need to take place in order to make these things proceed, if that's the Commission's will or desire. The whole idea behind this report is just informational purposes so that we show what has been found to be potentially

problematic, if this proceeds, and what can be done to resolve the issues.

Snow It's impossible...thank you for that, Superintendent, but in my view, it's impossible to issue any violations when something doesn't exist.

Huskey That's correct.

Snow It's an impossibility. I'm just viewing this...we had a reasonably controversial matter not so long ago where we had an Excise report much like this, which was something that in two or three times with conclusions being in that particular report there were no apparent violations of Title 7.1. I think that's within the province of you good people to let us know. I want to know if we're heading in a direction where perhaps we're going to be running against some possible statutory prohibitions. I can assure everyone sitting in this room that I have not made up my mind on this at all. That is just what is true. I won't until it is presented to me in a proper manner. That having been said, I wanted to clear the air there a little bit to the best of my ability. Mr. Rusthoven, did you want to make a formal request here and then we'll hear from Mr. Herriman? Do we have another lawyer here that I'm ignoring? Mr...thank you, sir. Mr.....

Nelson Becker Becker

Sturtz Nelson Becker.

Snow You're welcome here, too, sir.

Rusthoven Thank you, Mr. Chairman. Peter Rusthoven with Barnes & Thornburgh. I'm here for Indiana Wine...I'm sorry, Indiana Wholesale Wine and Liquor Company. Indiana Wholesale's president, Jim Howard, is here with me as well. As a preliminary observation, I want to note that during the chairmanship of your predecessor, Mr. Herriman, is here with us today, anything with the name "Dodo" was considered, per se, a "inaudible" business.

Snow That is one of the areas I didn't want to go in because I'm the chair of the commission.

Rusthoven That being established. For my client, I can say that we very much appreciate the immediate distribution of the Excise report, in part because I think it allows us to address some things. We are grateful for that. Obviously, this is our transfer application. I would point out that because of...the transfer application was filed last year, late last year, but because of the time at which it is now coming up, which is no blame to anyone on the commission, some of the delays were requested by us because of scheduling problems, because of that, Indiana Wholesale has renewed its current lease and renewed its permits at those locations. So, this transfer application is sort of pending in a...we will wait to see what the Commission does on this transfer application before we would actually move. So from our standpoint with respect to what is after all our transfer application, we are not in a hurry at this point for an immediate decision. We don't have a business reason why it has to be

decided immediately. That said, I will tell you that much of this Excise report...and this is not a comment on the accuracy of what this Excise officer did. It was out of the blue to us. We'll not go into great detail, but there are reasons why we want to look at this. This is an employee...the Excise officer was discussing this with someone who's not our employee, so it's just wrong with respect to the description of our business. For example, Mr. Howard wants me to make the point that he does not sell to his employees. He does not sell liquor to his employees. I don't know if ATC rules prohibit that, but ATF rules don't like it, so we don't do that. Another example of where something got lost in translation, orders to Indiana Wholesale are handled at its call center in Michigan City, as opposed to any contemplation that they would be handled at a call center owned by someone else in Indianapolis. So, the other descriptions of how the anticipated operation business documents would work are totally news to us and completely contrary to our understanding of what the business deal is. All of which is a way of saying we would want to look at this to correct inaccuracies, not in what the Excise officer reported, but in terms of what was communicated to Excise by someone who was not our employee. We certainly want to look at it for purposes of clarifying any misunderstandings or inaccuracies about, in fact, our arrangement with E.F. Transit was supposed to operate, and finally to the degree that there are things in that report about which the Excise officer noted concern that may

have, in fact, been contemplated by E.F. Transit. I don't know that. I want the opportunity to address that, so we can revisit with the Excise police how we would structure it differently. Our point of this, and by "our" I mean, Indiana Wholesale, our point was to do two things; lease warehouse space and outsource certain services, contract out certain services for our own business reasons. We don't care if the person to whom we were making a deal also had an ownership interest in a dry cleaners, or residential real estate property, or anything else. We don't care. Our deal was that we wanted someone who could handle delivery, warehousing and delivery for us on a contract basis. That's what we are going to be proposing to the Commission. To the degree that there are other issues that may come up, we have tried to address some of those that agree with this Excise report coming in, (inaudible), having seen that, if I were in your position, I wouldn't approve this today based on this Excise report. I'd certainly have questions about it. So, we would like the opportunity to just review that Excise report, at which point when we've had a chance to address all this, it's our application, we'll get back with the Commission and say we're ready to go forward on this. Maybe the result will be that we will look at it and say maybe we won't go forward with this. But, that's what we propose.

Snow

Fair enough as far as hearing you. I want to hear from opposing counsel, Mr. Herriman. So, Mr. Herriman...and to the extent

there is any “Dodo” humor, let’s get it out of the way before we do business.

Herriman

You won’t hear it from me. Mr. Chairman, members of the Commission, my name is Bart Herriman, Clark Quinn Law Firm, here today representing Wine & Spirits Wholesalers of Indiana and two of their members, National Wine & Spirits and Olinger Distributing. I also received the Excise report, the preliminary report, yesterday. I was able to review it in about 45 minutes and get a handle on it. At first blush, there are roughly 12, maybe 11 or 12, noted possible violations if this matter goes forward. If Indiana Wholesale and Monarch are allowed to collaborate, as we set forth in our briefs, there is nothing, we believe there is nothing, Indiana Wholesale can do to remedy these issues. They can maybe come in and clear up maybe one small issue here and there, but the bottom line is they cannot locate at that facility and have Monarch, through its affiliated entity, E. F. T., transport liquor. It’s a non-starter. We are prepared to go forward today. If you don’t want to speak to the issue of the investigation, which I thought Officer Swallow did a very thorough job, then that’s fine. We’re ready to speak to it because we think it’s pertinent to the case at hand. We’re prepared to go forward. If the Commission wants to hear us, we’ll certainly speak to the merits of this issue. If on the other hand Indiana Wholesale wants to withdraw its application completely, then we would consider that as well. This thing has been delayed from time to time, but it appears from first blush

that Indiana Wholesale is going to have its work cut out trying to remedy all of the issues set forth in the very, thorough investigation by the Excise police.

Snow What is the sense of the commissioners?

Guthrie Pete, are you asking not to do anything today?

Rusthoven The Commission may be spending time today on something it may not need to spend time on at all. I mean, if we come back...I'll be perfectly candid. I'm going to take a look at this, see what we believe is inaccurate, whether it's something got lost in translation, then talk with what can be changed in terms of proposed, operational structure, and then maybe revisit with the Excise police or the Chairman or the Executive Secretary to review whether this is something we feel we should go forward with. If the Commission wants to hear a whole bunch of oral argument today on things we submitted, I suppose it could, but you may not ever have to do it. And, again, I would just repeat, this is our transfer application. We're willing, if the commission is willing, to just let it rest in abeyance while we address some of the things Superintendent Huskey's officer has reported to the Commission.

Johnson How much time do you need?

Rusthoven I think we need probably a couple of weeks. One...several things have to be dealt with. One, I want to go through with my client and say, there's some things...I know one thing like I reported to you, we don't sell to our employees. I don't know where that came from. I want to go through with my client

exactly what in here about our operations that is being reported secondhand through someone who doesn't work for us is inaccurate. Second, I want to sit down with E. F. Transit and say what in here is inaccurate in terms, I mean, this is inaccurate in terms of our understanding of the deal. What is inaccurate in terms of your understanding of the deal? But, it's not a matter that urgently requires Commission action, if the party who has filed the application is just asking you to wait until we've had a chance to address this.

Snow Let me chime in here, because I do have a sense of responsibility here, since I authorized the delivery of this report late yesterday, what I'm trying to do here is chair and I'm just giving this the best effort that I know how, is to be really transparent and open. I don't want the appearance to be that we blindsided anybody. A person could create an argument that we have. I didn't...that wasn't my intention to blindside anyone.

Rusthoven If I may interrupt just briefly, I think you avoided us being blindsided. I appreciate it. I wouldn't want to come in here and have this report given to me.

Snow Other thoughts of the Commission?

Johnson Mr. Herriman, do you have any?

Herriman No. I'm just kind of reiterating that we are here today and we're ready and willing to present our testimony and secondly, if the Commission believes that there should be some time provided, we believe Indiana Wholesale should just withdraw their permit. They've had plenty of opportunity to work with E.

F. Transit and Monarch to figure out a game plan. Obviously, they are not communicating. I would say they withdraw their permit altogether.

Johnson I think counsel is entitled to time. I would move to reset this for the next commission meeting.

Rusthoven If I could address that, sir? I was hoping to meet with the Executive Secretary afterwards. It happens, I don't necessarily want to get this all here on public record, but it happens that practice deadlines that can't be extended, one is a petition of the United States Supreme Court, also some personal reasons, probably the next Commission meeting wouldn't work very well for me in terms of physically being able to do it with other deadlines. I just wanted to address that with the Executive Secretary, if that's permissible.

Snow We can work on timelines later. I'm inclined to...the request is well taken and to the extent...I haven't indicated this to anybody, I do take some of the responsibility here and I don't want to ever sit back and think Chair Snow blindsided anybody. It is not my nature.

Herriman Mr. Chairman, I guess the thought of Indiana Wholesale coming back and meeting with the Executive Secretary, or the Chair, or any of the Commissioners with respect to trying to work out some of these kinks in their game plan, it seems to me that...I guess we have been designated amicus curiae in this matter, we'd like to be at the table when those issues are discussed cause we don't want any ex parte communications.

Snow That's reasonable.

Rusthoven With respect, I would respectfully disagree with the Chair's initial reaction to that. Whenever an applicant is dealing with an application and dealing with the Excise police, there's no requirement and no practice whatsoever that competitors can be in there and say, "no, no, we don't like that." We'll work with the Excise police and it's report will be public and then anybody can make comments on it, but the idea that every discussion that I have with an Excise officer I have to call everybody up and say, "come on in here..."

Snow I'm not hearing Excise officer. I think you can do that. It's just you're sensitive to Mr. Rusthoven coming in and seeing me because I can break ties here. I can put in two votes.

Herriman Precisely. The Commissioners are going to be the triers of fact in this case. We respectfully would like to be in front of you when these arguments are being put forth. We have no...

Rusthoven I have no problem with that.

Herriman problem with Indiana Wholesale meeting with Excise.

Snow Sure. All right.

Guthrie I'm not one to have two hearings when one will do, so I'm sensitive to maybe there's some people who came here today that will have to come back.

Snow I was told we were going to have some people show up today. To the extent that we do justice here, there's an old saying, "justice delayed can be justice denied." I don't think so in this case. I think the safe harbor is to move it off. I think probably,

and I have the utmost respect for all the lawyers have worked on this, I'm sensitive to ex parte communications and try my best to avoid them at all cost. I'm probably too sensitive to that in my previous job, where it was just absolutely taboo to do that. I know I have a different job here. I am in a different element. I'm in an executive branch of government. I've had telephone conversations probably with the lawyers in the room today without another somebody else being on the telephone conversation, but they didn't deal with matters of substance. I don't want to deal with matters of substance unless the other person is here to say...you know, I always like to know whose ox is being gored here, so I'll know what's going on. So, I think we may have stumbled into an agreement that we're not going to hear it today. We'll have to have a motion on that. I have absolutely no problem with Mr. Rusthoven getting together with the Excise people, going through. That's what this is for. I get that. But, to the extent that I intervene in any way, counsel should be notified and invited. Fair?

Herriman Yes, sir.

Guthrie Commissioner Johnson, would you amend your motion to let the Executive Secretary schedule a hearing, rather than moving it to the next meeting?

Johnson Certainly.

Guthrie Then, I'll second that with a note that anybody else in the room that wants to be advised, or have a say in scheduling, should let Mr. Dunsmore know. He knows two people, but if there are

others that wanted to be consulted, they should let him know.

I'll second the motion.

Sturtz Joe, you drove a long way. Do you want to...

Joe I'll pass my business card over at the end of the meeting.

Snow Dale gave me a call and said, and I'm sorry, I know you drove forever. I hope you're getting a sense that we're trying to do this right.

Joe Certainly.

Snow That's all we can do is try. We're going to disappoint somebody, but that's what we do. Okay. Those in favor of the motion signify by saying, aye.

Sturtz Aye.

Johnson Aye.

Guthrie Aye.

Snow Those opposed? That motion carries. Thank you, Bart for your sensible approach and Peter, as well.